The International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, Rochester, New York (Griffin Insulation Company, Inc.) *and* John Landowski and the Master Insulators' Association of Rochester, New York, Party to the Contract. Case 3–CB–5929

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 23, 1992, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

[1] The Respondent also filed a motion to strike a portion of the General Counsel's answering brief, on the basis that it was beyond the scope of the Respondent's exceptions. The General Counsel filed a response in opposition to the Respondent's motion to strike. We deny the Respondent's motion to strike, finding that the portion of the General Counsel's answering brief at issue properly dealt with questions raised by the Respondent's exceptions. We grant the Respondent's motion to correct the transcript.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In the text of his decision, the judge found that in refusing to refer John Landowski, the Respondent attempted to cause and did cause Employers Griffin, Frontier, ''and other employer-members'' of the Master Insulators' Association of Rochester, New York (the Association), to unlawfully discriminate against Landowski. Because the complaint as amended specifies only Griffin and Frontier, we do not rely on the judge's finding regarding the ''other employer-members'' of the Association.

At fn. 3 of his decision, the judge found that in view of his finding that the Respondent operated an exclusive hiring hall and violated Sec. 8(b)(1)(A) and (2) of the Act, it was unnecessary to pass on the General Counsel's alternative contention. That contention was based on the argument that even if the Respondent operated a nonexclusive hiring hall, it violated its duty of fair representation by refusing to refer John Landowski. The judge further stated, however, that had it been necessary to consider this contention, he would have found merit in it. We do not rely on the judge's statement that he would have found merit in the General Counsel's alternative contention, because the duty of fair representation does not attach to a union's operation of a nonexclusive hiring hall. *Carpenters Local 537 (E. I. du Pont)*, 303 NLRB 419, 420 (1991).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, Rochester, New York, its officers, agents, and representatives, shall take the action set forth in the Order.

Michael Cooperman, Esq., for the General Counsel.
James R. LaVaute, Esq. (Blitman & King), of Syracuse, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The amended complaint in this case, as further amended at the hearing,[1] alleges that the Respondent, the International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, Rochester, New York, has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). More particularly, the Respondent is alleged to have maintained provisions in its collective-bargaining agreement with the Master Insulators' Association of Rochester, New York (the Association), which give unlawful preferences to members of the Respondent when employer-members of the Association hire or lay off employees. The Respondent is further alleged to have unlawfully refused to refer the Charging Party, John Landowski, for employment with employer-members of the Association, Griffin Insulation Company, Inc. (Griffin) and Frontier Insulation (Frontier). The answer filed by the Respondent denies that it has violated the Act.[2]

The hearing was held in Rochester, New York, on April 29 and 30, 1992. On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

[1] The complaint initially alleged, inter alia, that the Respondent had unlawfully refused to refer the Charging Party to an employer. At the hearing, I granted the General Counsel's motion, over the Respondent's objection, to add an allegation that, at or about the same time frame, the Respondent unlawfully refused to refer the Charging Party to a second employer. The Respondent had argued that the General Counsel had knowledge of it when the complaint issued. In its brief, the Respondent restated that objection and cited *Wilson & Sons Heating*, 302 NLRB 802 (1991), as supportive of its contention. That case does not support the Respondent's contention. I shall treat the contention in the Respondent's brief as a motion to reconsider my ruling and shall deny it.

[2] The Respondent separately contends that Sec. 10(b) of the Act bars the alleged discriminatory conduct as to Landowski on the ground that he had prior notice that the Respondent gave preference to its members. The Respondent cited *A & L Underground*, 302 NLRB 467 (1991), to support its contention. That case concerned the repudiation of a contract. I find no merit in the Respondent's contention as the alleged violations before me are all timely in reference to Sec. 10(b) of the Act.

FINDINGS OF FACT

I. JURISDICTION

The pleadings, as amended, establish that Griffin and Frontier are engaged in the business of installing insulation at commercial and industrial facilities. Griffin and Frontier, in their respective operations annually, each meet the Board's nonretail jurisdictional standard.

The Association, of which Griffin, Frontier, and other employers are members, represents these employers in negotiating and administering collective-bargaining agreements with the Respondent.

The Respondent is a labor organization as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Contract Provisions*

The following provisions are in the collective-bargaining agreement between the Respondent and the Association:

Hire and Lay-Off Procedure

1. Class A Mechanics are those who have been issued Union membership as Mechanics by [the Respondent].

2. Class B are those qualified Mechanics who are members of the International Association [within] the territorial jurisdiction of other Local Unions.

3. Employers shall first employ Mechanics in Class A who are registered and available for employment, then Mechanics in Class B. Separate lists shall be maintained for registration of Mechanics in each such class.

Classification of Apprentice

4. Class A are those Apprentices who are duly indentured and enrolled in the Joint Apprenticeship Training Program of the [Respondent] and the Employers Association.

Class B are those employees of Probationary apprentice grade who have not qualified as Mechanics and have not been indentured and enrolled in the joint Apprenticeship Program of the [Respondent] and the Employers Association.

5. All Employers shall first employ Apprentices in Class A who are registered and available for employment and then may employ Class B employees of probationary apprenticeship grade providing no indentured apprentice is unemployed and available for work. No Class B Probationary Apprentice may continue employment when any Indentured Apprentice is unemployed.

Lay-Off Order

6. In the laying-off of employees all Mechanics in Class A shall be treated as having been hired prior to Mechanics in Class B. All Mechanics in Class B shall be laid off before any Mechanics in Class A are laid off. Shops that employ Class B Mechanics shall not continue their employment [Class B] when Class A Mechanics are unemployed and available for work.

Similarly all Apprentices in Class A shall be treated as having been hired before those in Class B and all those in Class B shall be laid off before those in Class A. Shops that employ Class B Apprentices shall not continue their employment [Class B] when Class A Apprentices are unemployed and available for work.

7. No Probationary Apprentice shall begin employment or if employed remain employed during any period where any indentured apprentice is available for employment but is unemployed.

The Respondent offered testimony by its business manager, William Urquhart, that the actual import of these provisions is to ensure that employees with 10,000 hours of experience in the trade and who have worked for employers under the agreement are given preference and that is all that is intended by the references in the contract to the preferences given to its members. Nonetheless, these contractual provisions violate the express provisions of the Act and are not privileged by the Respondent's assertions of good-faith or practical considerations. See *Manitowac Engineering Co*., 291 NLRB 915, 918 (1988). Moreover the hiring and layoff provisions are so clearly set out as to outweigh any probative value alluded to in Urquhart's extrinsic testimony. See *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 425 (1984).

B. *Alleged Unlawful Refusals to Refer Landowski for Employment*

The complaint, as amended, alleges that the Respondent, because Charging Party John Landowski was not a member, refused requests to refer him to Griffin, to Frontier, and to other employer-members of the Association for employment. The Respondent denies that it refused any such request and it avers that it need not have honored such a request as it does not operate an exclusive hiring hall. On the latter contention, the General Counsel asserts that the Respondent does operate an exclusive referral system. Alternatively, the General Counsel argues that the Respondent has violated its duty to fairly represent Landowski in the unit it represents by not referring him, even if the Respondent does not maintain an exclusive referral system.

Landowski is a member of a Carpenters local union in the Rochester, New York area. This is the area in which the Respondent represents journeymen and apprentices who do insulation work. In 1988, Landowski was laid off from work as a carpenter. He got a job doing insulation work for an employer-member of the Association, i.e., Rochester Industrial Insulation under the following circumstances. Landowski's wife was secretary to Ed Stone, the owner of Rochester. Stone asked William Urquhart, the Respondent's business manager, about Landowski then when he was at a meeting the Respondent was having with the Association. According to Urquhart, Stone told him that he would like to hire Landowski as a favor to Landowski's wife and other members of the Association (including Griffin and Frontier) joined in the request ''trying to sell it to [the Respondent] . . . so that [they] could get [Landowski] started.'' Urquhart consented.

Landowski began working for Rochester Insulation in October 1988 and was laid off in April 1989. He then went to work for Griffin, according to records furnished by the Respondent, and was with Griffin until he was laid off in July 1989. He returned to Griffin in November 1989 when work

picked up and worked there until July 1990. In August and September 1990, he worked for Rochester Insulation. In September, he returned to Griffin and was assigned to an insulation job at a Kodak plant. In March 1991 Kodak told Griffin that it needed a smaller crew. Kodak's representative asked that Landowski be kept on the job. Landowski was a permit mechanic, that is, one who is neither a member of the Respondent nor of one of its sister locals.

Jay Griffin, the president of Griffin, testified that he then asked Urquhart if Landowski could stay on. His testimony was to the effect that if Landowski was retained, an A mechanic would have to be laid off. According to Jay Griffin, Urquhart told him that Landowski could not continue to work. Griffin then laid off Landowski. His layoff then is not alleged as violative of the Act.

Landowski testified that, about 4 weeks later, he asked Urquhart at his office for work and was told that there was none and that, instead, Urquhart told him that he would call in mechanics from Buffalo and Syracuse. Landowski testified further that Urquhart told him that the men did not like Landowski because he had demanded overtime work.

Urquhart's account of a discussion he had with Landowski then was that he told Landowski that he might be able to give him a definite answer in a few weeks about work opportunities, that ''for the next six months . . . it's real spotty,'' and that there was work coming up soon in another area if Landowski ''would want to go down there.''

There are two versions of another conversation Urquhart had, this one with Jay Griffin. Griffin testified that, in July 1991 when Kodak wanted more insulation work done, he called Urquhart and in that discussion he told Urquhart he would appreciate it if he could get Landowski back. Griffin related that Urquhart responded that Landowski could not go back.

Urquhart's version is as follows. Griffin asked that Landowski be included in the referral to the Kodak job. Urquhart replied that he preferred not to refer Landowski because Landowski does not have ''that much training (and as Urquhart would) really like to help out some of the Buffalo guys that are out of work.''

Urquhart further testified, in substance, that he never objected to an employer's hiring anyone on its own. Jay Griffin, on the other hand, testified that, in all his dealings with Urquhart which include the 10 years he served as president of the Association, employers ''can hire people that are out of work as long as they're A mechanics without going through [Urquhart]'' and that they cannot hire on their own anyone who is not an A mechanic. As noted above, an A mechanic is one who is a member of the Respondent. Timothy Brady, vice president of Frontier, testified that Frontier's practice has been to call Urquhart for referrals for all its employees, except that it can hire members of the Respondent on its own. Brady also testified that, in April 1991, he asked Urquhart if Landowski was available for referrals and was told that he would send ''travelers'' (i.e., members of the other locals of the Respondent's International Union) to Frontier. Brady related that Urquhart then referred only travelers.

I credit the accounts of Landowski, Griffin, and Brady where they are in conflict with the testimony of Urquhart. Their demeanor indicated to me that they readily deferred to Urquhart. Urquhart's demeanor suggests that they had good reason to defer to him in view of his authority over referrals. At one point in the hearing, he dismissed the General Counsel's efforts to obtain an answer to a question even though his own counsel had indicated to him that he should be responsive. Urquhart persisted, saying that he had answered that same question ''10 minutes ago, 15 minutes ago,'' and that his answer ''was already in the record.'' His evasion of the question suggests to me that he feared that an answer might not have comported with his previous answer. His persistence in declining to answer suggests too that he is accustomed to having the final say.

I find that the employer-members of the Association do not hire employees unless they are members of the Respondent, without Urquhart's consent or referral. Urquhart enforces the express discriminatory hiring criteria, quoted above, set out in the collective-bargaining agreement between the Respondent and the Association. I further find that Griffin, Frontier, and Landowski had applied to the Respondent's business manager to refer Landowski out to employment and that their efforts were rejected by him because Landowski was not a member of the Respondent. Although the dates on which Griffin and Frontier asked for Landowski's referral vary from the dates set out in the complaint, the issues were fully litigated and the findings thereon are within the ambit of the amended complaint. In that regard, see *All-American Gourmet*, 292 NLRB 1111, 1135 (1985), and cases cited there.

The primary contention of the General Counsel is that the Respondent unlawfully refused to honor the requests of Griffin, Frontier, and Landowski, himself, to refer Landowski for employment from the exclusive referral system it operates. The Respondent asserts that it does not operate an exclusive system, noting that there is nothing in its collective-bargaining agreement with the Association pertaining to a referral system. It notes also that Griffin and Frontier are free to hire employees on their own. The credited evidence, however, establishes that Griffin and Frontier have followed a long-established practice of hiring all but members of the Respondent by calling Urquhart for referrals. In these circumstances, I must find that the Respondent has maintained an exclusive referral system on behalf of the employer-members of the Association. See *Carpenters Local 608 (Various Employers)*, 279 NLRB 747, 754 (1986), and cases cited there.

The credited evidence further establishes that the Respondent failed to honor the requests to refer Landowski because he was not a member, either of the Respondent or of one of its sister locals. It is well settled that a labor organization unlawfully discriminates against an applicant by refusing to refer him from its exclusive referral system based on nonmembership. See *Laborers Local 644 (Kellerman Construction)*, 278 NLRB 1104 (1986). I thus conclude that the Respondent, in refusing to refer Landowski because he was not a member, has attempted to cause and did cause Griffin, Frontier, and other employer-members of the Association to discriminate against him in violation of the Act.[3]

[3] In view of this finding, it is unnecessary to pass on the General Counsel's alternate contention, that the Respondent violated its duty of fair representation as to Landowski by having arbitrarily refused to refer him. Had it been necessary to make a finding thereon, I would find merit. In that regard, see *Carpenters Local 1016 (Bertram Construction)*, 272 NLRB 539 (1984).

Continued

CONCLUSIONS OF LAW

1. The Association, Griffin, and Frontier are each an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act by having:

(a) Maintained provisions in its collective-bargaining agreement with the Association which give preference to employees in hiring and in protection against layoff based on their being members of the Respondent.

(b) Refused applications by Griffin, Frontier, and Landowski to refer Landowski to employment, from the exclusive referral system it operates on behalf of employer-members of the Association, because he is not a member of the Respondent.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, it should be ordered to cease and desist from engaging in such activities and to take certain affirmative action to effectuate the policies of the Act.

It should be required to notify the Association in writing that it will not give any force or effect to those provisions of its collective-bargaining agreement which give job preferences to its members. It should notify the Association, Griffin, Frontier, and Landowski in writing that it has no objection to Landowski's being employed by employer-members of the Association without his being referred by the Respondent and it should also notify in writing that it will honor requests to refer Landowski. It shall make Landowski whole for any loss of wages and benefits he may have suffered as a result of its refusals to refer him and until it sends out the written notices to the Association, Griffin, Frontier, and Landowski as described above. The amount of backpay due shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, the International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, Rochester, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining those provisions in its collective-bargaining agreement with the Master Insulators' Association of Rochester, New York (Association), which give preference to employees in hiring and in protection against layoff based on their being members of the Respondent.

(b) Refusing applications by Griffin Insulation Company (Griffin), by Frontier Insulation (Frontier), and by John Landowski to refer Landowski to employment, from the exclusive referral system it operates on behalf of employer-members of the Association, because he is not a member of the Respondent.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Association in writing that it will not give force or effect to those provisions of its collective-bargaining agreement which give job preferences to employees based on their membership in the Respondent.

(b) Notify in writing the Association, Griffin, Frontier, and Landowski that it has no objection to Landowski's being employed by any of the employer-members of the Association without his being referred by the Respondent and also notify them in writing that it will honor requests to refer Landowski without regard to union membership.

(c) Make Landowski whole, with interest as described in the remedy section above, for any loss in wages or benefits he suffered by the refusal of the Respondent to refer him for employment because he is not a member of the Respondent.

(d) Post at its office copies of the attached notice, marked Appendix.[5]

(e) Furnish to the Regional Director sufficient copies of the attached notice, signed by an official of the Respondent, for posting by employer-members of the Association, if they are willing.

(f) Notify the Regional Director in writing within 20 days of the date of this Order what steps have been taken to comply with it.

The Respondent offered Urquhart's testimony that Landowski was inexperienced. That testimony may relate to a contention that, notwithstanding any discriminatory motive found, the Respondent would still not have referred him because of its view that he was unqualified to perform the work that Griffin, Frontier, and Rochester had assigned him. Any such contention would be without merit.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain those provisions in our contract with the Master Insulators' Association of Rochester, New York, which give preference to employees in hiring and in protection against layoffs based on their being members of our Union.

WE WILL NOT refuse to honor requests by Griffin Insulation Company or Frontier Insulation to refer to them John Landowski for employment, or refuse to refer Landowski to any employer-member of the Association, because Landowski is not a member of our Union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify the Association in writing that WE WILL NOT give force or effect to those provisions of our collective-bargaining agreement which give job preferences to employees based on their membership in our Union.

WE WILL notify, in writing, the Association, Griffin, Frontier, and John Landowski that we have no objection to John Landowski's being employed by any of the employer-members of the Association without his being referred by us and WE WILL honor requests to refer Landowski without regard to his union membership.

WE WILL make John Landowski whole, with interest, for any loss of wages or benefits he suffered by reason of our failure to refer him for employment because he is not a member of our Union.

THE INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS LOCAL NO. 26, ROCHESTER, NEW YORK